80-2052 No.

Office-Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1980

LOCAL 9, INTERNATIONAL CHEMICAL WORKERS UNION, AFL-CIO,

Petitioner,

vs.

ARTHUR EISENBERG, Regional Director of the Twenty-second Region of the NATIONAL LABOR RELATIONS BOARD, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Is the issue moot or is the issue one "capable of repetition, yet evading review"?

2. Is the respondent Union, in a 10(L) injunction proceeding brought by the National Relations Board entitled to discovery?

PARTIES

There has been no change in the parties involved in this proceeding.

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No.

In The

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October Term, 1980

LOCAL 9, INTERNATIONAL CHEMICAL WORKERS UNION, AFL-CIO,

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vs.

ARTHUR EISENBERG, Regional Director of the Twenty-second Region of the NATIONAL LABOR RELATIONS BOARD, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Local 9, International Chemical Workers Union, AFL-CIO, the petitioner herein, prays that a writ of certiorari issue to

review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on March 4, 1981.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Third Circuit determining the issues is printed in Appendix A hereto, *infra* at p. 1a. The judgment of the United States District Court for the District of New Jersey is printed in Appendix B, *infra* at p. 2a.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on March 4, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(a).

STATUTES INVOLVED

National Labor Relations Act, as amended (61 Stat. 149; 73 Stat. 544, 29 U.S.C. Section 151, *et seq.*):

> 29 U.S.C. Section 158(b)(4)(i)(B) and (ii)(B)
> Section 8(b)(4)(i)(B)
> Section 8(b)(4)(ii)(B):
>
> "(b) It shall be an unfair labor practice for a labor organization or its agents —
>
> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process,

transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is —

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 (29 USCS Section 159): Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; . . ."

29 U.S.C. Section 160(f)
Section 10(f):

"Review of final order of Board on petition to Court. Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States Court of Appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the

District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the Clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code (28 USCS section 2112). Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

29 U.S.C. Section 160(1)
Section 10(1):

"(1) Boycotts and strikes to force recognition of uncertified labor organizations-Injunctions-Notice-Service of process. Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 8(b) or section 8(e) or section 8(b)(7) (29 USCS Section 158(b)(4)(A),(B),(C)(e),(b)(7)), the preliminary investigation of such charge shall be made

forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: Provided further, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: Provided further, That such officer or regional attorney shall not apply for any restraining order under section 8(b)(7) (29 USCS Section 158(b)(7)) if a charge against the employer under section 8(a)(2) (29 USCS Section 158(a)(2) has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served

upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: Provided further, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D) (29 USCS Section 158(b)(4)(D))."

Federal Rules of Civil Procedure:

Rule 26(b)(3):

"(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant,

surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded."

Rule 34(a):

"(a) Scope. Any party may serve on any other

party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b)."

Rule 34(c):

"(c) Persons not Parties. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land."

Rule 37(a):

"(a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) Appropriate Court. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) Motion. If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order. If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) Evasive or Incomplete Answer. For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) Award of Expenses of Motion. If the motion

is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner."

STATEMENT OF CASE

The International Chemical Workers Union, Local No. 9, hereinafter referred to as the Union, represents the production, warehouse and maintenance employees at Ciba-Geigy Pharmaceuticals Division, hereinafter referred to as the Company, in Summit and West Caldwell, New Jersey.

The Union struck on April 16, 1980, at the expiration of the then existing contract. The Company established one of the many entrances in the gate to the plant in Summit as a construction gate. The Union picketed the alleged construction gate.

The Company apparently filed an unfair labor practice charge and the National Labor Relations Board, hereinafter referred to as the NLRB, brought a 10(L) injunction proceeding in the United States District Court to enjoin the Union from picketing the gate pending the outcome of an unfair labor practice hearing. If there was no hearing, the injunction is to terminate at the end of sixty days.

Jurisdiction of the District Court is contained in 29 U.S.C. §160L (Section 10L).

A hearing was commenced on May 5, 1980, and continued on May 8, 1980. The Union was outside the gate of the facility which covers a large area and has a number of buildings. The Union neither presented any witnesses nor cross-examined the witness presented by the Regional Director of the NLRB.

The Union instead sought discovery, rather than use the court's time in a fishing expedition, in the hope of obtaining favorable facts or statements.

The Union also waived a board hearing scheduled for future date for similar reasons, as will be explained in the reasons for granting the writ.

The Union's sole defense would be if it could discover whether the outside construction contractors were doing maintenance employees work, which the Union suspected, the skills being the same.

REASONS FOR GRANTING THE WRIT

The Board's policy has been not to give discovery and the courts have tended to uphold the Board's position. *See "Amenability of NLRB to Discovery"*, 4 A.L.R. Fed. 493.

I.

Mootness. Is the Issue Moot?

10(L) proceedings and the unfair labor practice charge upon which said proceedings are predicated will probably always be moot by the time the appeals concerning discovery are decided.

The reasons are simple. In this case the sixty-day injunction period expired. In other cases the strikes will hopefully end before a decision.

Therefore, if discovery is denied the issue will almost invariably be moot by the time the appeals are taken and heard. The 10(L) proceeding itself is intended to be expeditious.

The instant case is similar to a number of other cases on the issue of mootness decided by this Court. *Securities and Exchange Comm. v. Sloan*, 436 U.S. 103, 98 S. Ct. 1702, 56 L. Ed. 2d 148; *County of Los Angeles v. Davis*, 440 U.S. 625, 99 S. Ct. 1379, 59 L. Ed. 2d 642 (1979); *Super Tire Engineering Company, et al. v. Lloyd W. McCorkle, et al.*, 416 U.S. 115, 40 L. Ed. 2d 1, 94 S. Ct. 1694.

Local 9 may someday strike in the future and another construction gate may be created, as has occurred in the past. The exact same issue may be presented again, but will not be capable of review before it is claimed moot.

The court should decide that the issue is not moot, but is a judiciable case or controversy presenting an issue "Capable of repetition, yet evading review." *Super Tire Engineering Company, supra.*

II.

Discovery. Is the Union entitled to discovery?

The purpose of 10(L) proceedings are to as expeditiously as possible see to it that commerce is not impeded by improper picketing of the construction gate.

Unions on the other hand usually seek to cripple the employer as much as possible during a strike to as rapidly as possible bring about a settlement. Obviously, unions would like to be able to picket all gates. However, the majority of unions do not want to have to picket a gate where the penalty is contempt for its members for violating court orders and possibly face damage suits in tort for illegally picketing.

The Union in the case at bar took the position that if in fact the construction contractors were building new buildings and doing work not traditionally performed by the bargaining units maintenance men, they should be permitted to continue going through the gate and the gate should be free from picketing.

If in fact the contractors are also doing maintenance, as well as construction work, and the gate is merely being used as a subterfuge, then the Union should be permitted to picket the gate. *United Steelworkers of America, AFL-CIO et al. v. NLRB,* 376 U.S. 492, 11 L. Ed. 2d 863, 84 S. Ct. 899.

Counsel, in order to properly advise the Union members, sought copies of the contracts between the Company and the

contractors, using the construction gate, and also copies of invoices showing payment for work done by the contractors in order to determine what work was agreed to be performed and what work in fact was being performed.

Furthermore, the Union sought reasonable inspection inside the plant, possibly on a once a week basis, at the convenience of the Company so that the Union representatives could observe for themselves that the contractors were in reality doing "new construction" and not maintenance work.

The Union's position is that some discovery should be granted in cases such as the instant case in order to facilitate the proper administration of justice and to benefit the public. Furthermore, the Union contends that the district court judge hearing the 10(L) proceeding should be permitted, as justice requires, the granting of some continuing discovery in the injunction order, so that the respondent Union in such a proceeding can properly discover whether it has a right to picket the gate and that the gate is not merely being used as subterfuge.

If unions are unable to obtain discovery expeditiously, the only alternative is to picket, or cause hearings in court on the initial injunction and possibly in future contempt proceedings on the court's original order every time there is a belief that bargaining unit work is going through the construction gate.

Reason dictates that there should be procedures for courts to grant discovery enabling respondent Union the opportunity to make intelligent decisions on whether to consent to a judgment enjoining picketing or to contest the matter both in court and before the Board.

The Fifth Circuit Court of Appeals in *N.L.R.B. v. Rex Disposables,* 494 Fed. Rep. 2d 588, the court stated:

> "Justice under law is, of course, the ultimate goal of this Court. We exercise a broad discretion to require such proceedings to be had as may be just under the circumstances. 28 U.S.C. Section 2106; cf. Rule 1 of F.R. Civ. P. 2. We agree with the Fourth Circuit that under some circumstances the Board's decision not to provide discovery may result in unfairness. *Firestone v. Synthetic Fibers Co. v. NLRB*, 4 Cir. 1967, 374 F. 2d 211, 214. This Court is committed to the doctrine that when good cause is shown to the Board it should permit discovery in order that the rights of all parties may be properly protected. *NLRB v. Safway Steel Scaffold Co. of Georgia*, 5 Cir. 1967, 383 F. 2d 273; *NLRB v. Miami Coca-Cola Bottling Co.*, 5 Cir. 1968, 403 F. 2d 994, 996. Also see *NLRB v. Southern Materials Co.*, 4 Cir. 1967, 345 F. 2d 240, 244. We adhere to that doctrine despite the able but highly technical opinion of the Second Circuit to the contrary in *NLRB v. Interboro Contractors, Inc.*, 2 Cir. 1970, 432 F. 2d 854. The function of judges is to administer justice without respect to persons. 28 U.S.C. Section 453. They must refuse to enforce administrative orders which they find to be unjust or the product of unjust administrative procedures or policies."

A chairman of the NLRB has suggested that there be full disclosure in accord with the Federal Rules of Civil Procedure. *Tool & Die Makers' Lodge No. 78*, 5 Lab. L. Rep. (1975-1976 NLRB Dec.) 16,814 at 27,771 N7 (May 28, 1976) (dissenting opinion).

There have been recent Law Review articles written on the issue of discovery and the NLRB. Among them are 1976 *Brigham Young University Law Review* 845 and 46 *Univ. of Cinn. Law Review* 500.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

STANLEY S. SPECTOR
Attorney for Petitioner

APPENDIX A — JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 80-2086

ARTHUR EISENBERG, Regional Director of the Twenty-Second Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board

v.

LOCAL 9, INTERNATIONAL CHEMICAL WORKERS UNION, AFL-CIO,

Appellant

Appeal from the United States District Court for the District of New Jersey
C.A. No. 80-1180

Submitted Under Third Circuit Rule 12(6)
February 23, 1981

Before: ADAMS, ROSENN and HUNTER, *Circuit Judges.*

The foregoing appeal is dismissed as moot. Each side to bear its own costs.

BY THE COURT,

s/ A.M. Adams
Circuit Judge

Appendix A

ATTEST:

s/ Sally Mrvos
Sally Mrvos, Clerk

DATED: Mar. 4, 1981

APPENDIX B — ORDER GRANTING TEMPORARY INJUNCTION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ARTHUR EISENBERG, Regional Director of the Twenty-second Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Petitioner

v.

LOCAL 9, INTERNATIONAL CHEMICAL WORKERS UNION, AFL-CIO,

Respondent.

This cause came on to be heard upon the verified Petition of Arthur Eisenberg, Regional Director of the Twenty-second Region of the National Labor Relations Board, for and on behalf of the Board, for a temporary injunction pursuant to Section 10(1) of the National Labor Relations Act, as amended, pending the final disposition of the matters involved pending before the Board, and upon the issuance of an Order to Show Cause why injunctive relief should not be granted as prayed in the Petition. The Court, upon consideration of the pleadings, evidence, briefs, argument of counsel and the entire record in the case, has made its Findings of Fact and Conclusions of Law, finding and concluding that there is reasonable cause to believe that Respondent has engaged in, and is engaging in, acts and conduct in violation of Section 8(b)(4)(i) and (ii)(B) of the Act, affecting commerce within the meaning of Section 2(6) and (7) of the Act, and that it is just and proper to require Respondent to take action as set forth below.

Appendix B

Now, therefore, upon the entire record, it is

ORDERED, ADJUDGED AND DECREED, pending the final disposition of the matters involved pending before the National Labor Relations Board, that Respondent, Local 9, International Chemical Workers Union, AFL-CIO, its officers, representatives, agents, servants, employees and all members and persons acting in concert or participation with them be, and they hereby are, enjoined and restrained from:

(a) Picketing at or in the vicinity of the Contractors' Entrance (Ciba-Geigy Contractors' Entrance Not For Ciba-Geigy Employees) gate located on the facility of Ciba-Geigy Corporation, Passaic Avenue, Summit, New Jersey.

(b) In any manner or by any means, including picketing, orders, directions, instructions, requests or appeals, however given, made or imparted, or by any like or related acts or conduct, or by permitting any such to remain in existence or effect, engaging in, or inducing or encouraging any individual employed by Braun & Chamberlin, Inc., Clemco Construction Co., Inc., Lawton and Burns, Inc., Nordling, Dean Electric Co., Inc., Nova Insulation, Paul Miller Sheet Metal Works, Inc., Woolsulate Corporation, or by any other person engaged in commerce or in any industry affecting commerce, to engage in a strike or refusal in the course of his employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials or commodities or to perform any service, or in any manner or by any means threatening, coercing or restraining Braun & Chamberlin, Inc., Clemco Construction Co., Inc., Lawton and Burns, Inc., Nordling, Dean Electric Co., Inc., Nova Insulation, Paul Miller Sheet Metal Works, Inc., Woolsulate Corporation, or any other person engaged in

commerce or in an industry affecting commerce where in either case an object thereof is either to force or require Braun & Chamberlin, Inc., Clemco Construction Co., Inc., Lawton and Burns, Inc., Nordling, Dean Electric Co., Inc., Nova Insulation, Paul Miller Sheet Metal Works, Inc., Woolsulate Corporation, or any other person engaged in commerce or in an industry affecting commerce to cease using, selling, handling, transporting, or otherwise dealing in the products of or to cease doing business with Ciba-Geigy Corporation.

Done at Newark, New Jersey, this 8th day of May, 1980.

s/
UNITED STATES DISTRICT JUDGE